

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE**

THE ACADEMY OF MAGICAL ARTS, INC.

and

Case No. 31-CA-166705

AMERICAN FEDERATION OF MUSICIANS, LOCAL 47

Rudy Sandoval, Esq., Counsel for the General Counsel.

Jon McNutt, Esq., *Musick, Peeler & Garrett LLP*, Counsel for the Respondent.

Lewis Levy, Esq., Counsel for the Charging Party.

DECISION

Statement of the Case

Joel P. Biblowitz, Administrative Law Judge: On December 6, 2016 the parties submitted a Joint Motion to Transfer Proceedings to Division of Judges, Stipulation of Facts, Statement of Issues Presented, and Parties Brief Statement of Position. This motion waives a hearing before an administrative law judge and seeks findings of fact, conclusions of law and an appropriate order based upon the stipulation of facts and briefs submitted by the parties. On December 7, 2016, Associated Chief Administrative Law Judge Gerald Etchingham issued an Order approving the Joint Motion and Stipulation of Facts, assigned the case to me, and set a date for the filing of briefs. The parties stipulated to the following:

(a) The charge in this proceeding was filed by the Charging Party on December 22, 2015, and a copy was served on Respondent by U.S. mail on or about December 28, 2015.

(b) At all material times, Respondent has been a corporation with an office and place of business in Hollywood, California, Respondent's facility, and has been a private club operating a restaurant, entertainment venue, and bar engaged in the retail sale of food and entertainment.

(c) In conducting its operations during the calendar year ending December 31, 2015, Respondent derived gross revenues in excess of \$500,000. During the calendar year ending December 31, 2015, Respondent in conducting its operations described above in paragraph (b), purchased and received at its Hollywood, California facility goods valued in excess of \$5,000 directly from points outside the State of California.

(d) At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

(e) At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

(f) At all material times, Eddie Villanueva held the position of Respondent's Controller and has been an agent of Respondent within the meaning of Section 2(13) of the Act.

(g) The following employees of Respondent ("the Unit") constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All individuals who conduct musical performances through the Employer's instrument, known as the Irma. These employees shall be referred to herein as the "Musician" or "Musicians"

5 Excluded: All other employees, independent contractors, intermittent and casual employees, confidential employees, managerial employees, guards and supervisors within the meaning of the National Labor Relations Act.

10 (h) Since at least 2010, AMA has recognized the Union as the exclusive collective bargaining representative of the Unit.

(i) Since at least 2010, based on Section 9(a) of the Act, the Union has been the exclusive collective bargaining representative of the Unit.

15 (j) On June 22, 2015, the parties entered into a Master Agreement specific to AMA which replaced the predecessor Area Standards Agreement (ASA). The Master Agreement, which makes reference to and incorporates an AMA Employee Handbook, became effective from July 1, 2015, through June 30, 2018 (Master Agreement). A copy of the Master agreement is attached hereto as Jt. Exh. 1, a copy of the Employee Handbook is attached hereto as Jt. Exh. 2, and a copy of the predecessor ASA agreement is attached hereto as Jt. Exh. 3.

25 (k) The Master Agreement, at Article III Section B, entitled "Scheduling and Reporting," reads: "Changes to Shifts: The Employer retains the sole and exclusive right to assign shifts or work schedules for Musicians. Changes to work schedules may be made by the Employer-at any time, so long as it has notified the Musicians at least 24 hours prior to the change."

30 (l) The Master Agreement, at Article IV, entitled "Compensation," references and incorporates "Addendum A" which reflects wage scales and shift durations applicable to Unit employees. The shift durations noted in Addendum A reflect shift lengths that had been in place at AMA for at least five years preceding the parties' execution of the Master Agreement.

35 (m) The Master Agreement, at Article VI, Section A, entitled "Working Conditions" reads: "Employee Handbook: Except as specifically set forth in this Agreement, Musicians' working conditions and work rules will be set forth in the Employer's Employee Handbook and other employee policies, which may be revised by the Employer with or without notice, from time to time. Musicians are required to abide by the rules set forth in the Employer's Employee Handbook including, but not limited to, the Employer's policies on, timekeeping, meal and rest breaks, reporting tips and gratuities, immigration and work authorization, housekeeping smoking, and all other requirements not dictated by this Agreement. The Employer will provide a copy of the Employer's Employee Handbook to the Local upon execution of this agreement and when updated version are implemented for the Musicians."

45 (n) The Master Agreement, at Article IX, Section A, entitled "Miscellaneous" reads "Employer's Rights: The Employer retains, solely and exclusively, all the rights, powers, and - authority which it exercised or possessed prior to the execution of this Agreement, except as specifically abridged by this Agreement. Without limiting the generality of the foregoing, the rights, powers, and authority retained solely and exclusively by the Employer include, but are not limited to the following: To manage, direct and maintain the efficiency of its operations and personnel; to manage and control its departments and facilities; to create, change, combine or 50 abolish positions and jobs, departments and facilities in the whole or in part, to subcontract or discontinue functions and activities, to direct its staff; to increase or decrease its staff and determine the number of employees; to hire, transfer, promote, demote, suspend, discharge,

maintain the discipline and efficiency of its employee; to lay off employees; to establish work standards and rules, schedules of operation and workloads; to specify and assign work requirements and require overtime; to assign work and decide which employees are qualified to perform work; to schedule and change working hours, shifts and days off; to adopt rules of conduct and safety rules, and penalties for violations thereof; to determine the methods, processes, means and places of providing services; to determine the location and relocation of facilities; and to effect technological changes. The Musicians shall at all times conduct themselves in accordance with all applicable laws and shall observe professional decorum in the performance of their duties. The Musicians shall also adhere to such reasonable rules and code of conduct as the Employer may promulgate"

(o) On December 31, 2015, Unit employees did not receive premium pay (premium pay is considered double pay) for work performed by Unit employees on New Year's Eve (December 31). For at least the five years preceding the parties' execution of the Master Agreement, Unit employees had received premium pay for working on New Year's Eve at AMA. Premium pay relates to wages, terms, and conditions of employment of Unit employees.

(p) The AMA changed "Shift I" and "Shift VIII" (both noted in Addendum A to the Master Agreement) as follows:

1. Shift I, Beginning in November 2015 the AMA changed Shift 1 for Thursdays from 6:00 p.m.-12:00 a.m. (midnight) to 5:00 p.m.- 9:30 p.m. and created a second shift from 9:30 p.m.-1:30 a.m. Starting February 2016, those hours were changed to 5:00 p.m.- 9:00 p.m. and 9:00 p.m.- 1:00 a.m., respectively.
2. Shift VIII, Beginning in November 2015, the AMA changed Shift VIII for Sundays from 5:30 p.m.- 11:30 p.m. to 5:00 p.m.- 9:30 p.m. and created a second shift from 9:30 p.m. - 1:30 a.m. Starting February 2016, those hours were changed to 5:00 p.m. — 9:00 p.m. and 9:00 p.m.- 1:00 a.m., respectively.
3. Shift I, Beginning in February 2016, the AMA changed Shift I for Wednesdays from 6:00 p.m. — 12:00 a.m. (midnight) to 5:00 p.m. to 9:00 p.m. and created a second shift from 9:00 p.m. to 1:00 a.m.
4. Prior to making the shift changes noted above, the AMA provided at least 24 hours' notice to the Unit employees pursuant to Article III Section B of the Master Agreement. After July 1, 2015, the date the Master Agreement went into effect, AMA did not provide notice to the Union prior to making the shift changes noted above.
5. Shifts as noted herein worked by Unit employees relate to their hours, terms, and conditions of employment.
6. Regardless of the shift worked as noted in Addendum A, Unit employees' hourly wages remained the same as set forth in Addendum A to the Master Agreement.

(q) For reasons set forth in its position noted below, AMA did not pay premium (considered double pay) pay to Unit employees who worked this past New Year's Eve, December 31, 2015. For reasons set forth in its position noted below, AMA did not provide notice to the Union nor was there bargaining over non-payment of premium pay to Unit employees who worked this past New Year's Eve, December 31, 2015.

(r) During bargaining for the new Master Agreement, AMA was represented by Eddie Villanueva, Joe Furlow, and Jon C. McNutt and the Union was represented by John Acosta and Rick Baptist. During this bargaining, the parties discussed the AMA's potential desire to make changes to Unit employees' shifts and the Union's proposal that Unit employees not take a pay cut as a result of the implementation of the Master Agreement. The parties' subsequent resolution and agreement on those issues was memorialized in Article III, Section B, entitled

"Changes to Shifts." Relevant emails between the parties on bargaining on the issues at hand are attached hereto as Jt. Exh. 4.

(s) During bargaining for the Master Agreement, the parties did not specifically discuss AMA's paying premium pay to Unit employees working New Year's Eve, however, the parties discussed the application of the Employee Handbook as to all working conditions except as directed by the Master Agreement.

(t) It is understood that by signing this Joint Motion for a Stipulated Record, the Parties do not waive the right to make the arguments set forth in their respective position statements/briefs, or any other arguments.

(u) This Stipulation is made without prejudice to any objection that any party may have as to the relevancy of any facts stated herein, including facts contained in the documents submitted/attached through this Stipulation of Facts.

STATEMENT OF ISSUES PRESENTED

The Parties agree the issues in this matter to be:

1. Whether Respondent violated Section 8(a)(1) and (5) of the Act by making unilateral changes to Unit employees' length of shifts.

2. Whether Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally eliminating its practice of providing premium pay/double pay to employees who work on New Year's Eve.

STATEMENTS OF POSITION

1. AMA's position is that it was privileged to make the shift changes as described above in paragraph 5(p) pursuant to (i) the "Employer's Rights" clause contained in Article IX, (ii) Section A of the Parties' Master Agreement, and (iii) the "Changes to Shifts" clause contained in Article III, Section B of the Parties' Master Agreement, all of which established a clear and unmistakable waiver of the Union's right to bargain over changes to shifts. The General Counsel and Charging Party's position is that such "Employer's Rights" clause did not privilege AMA to make such changes in that Charging Party did not clearly and unmistakably waive Charging Party's right to bargain over said shift changes.

2. As to AMA's non-payment of premium/double pay to Unit employees who worked this past New Year's Eve December 31, 2015 without providing notice or an opportunity to bargain as described above in paragraph 5(o), the AMA's position is that no such notice nor bargaining was required in that it was privileged to take unilateral action based on the Master Agreement, including, but not limited to, language in Article VI, referencing and incorporating the Employee Handbook and because the Union and the AMA had agreed that the AMA Employee Handbook would dictate all "working conditions and work rules", including holiday pay, except as otherwise directed by the Master Agreement. The General Counsel and Charging Party's position is that the Charging Party did not clearly and unmistakably waive its right to bargain over changes to premium pay.

Relevant Contractual Provisions

Article IIIB of the Master Agreement effective July 1, 2015 through June 30, 2018, states: "Changes to Shifts: The Employer retains the sole and exclusive right to assign shifts or work schedules for Musicians. Changes to work schedules may be made by the Employer at any time, so long as it has notified the Musicians at least 24 hours prior to the change." Article V.A., Wages, states: "Payment of Wages shall be made in accordance with the Employer's normal pay practices."

The Respondent's 2015 Employee Handbook lists New Year's Day, but not New Year's Eve, as a paid holiday.

Additionally, in December 2015 there were emails between the Union and the Respondent regarding New Year's Eve premium pay. Rick Baptist, Vice President of the Union wrote to Eddie Villanueva, Respondent's Controller, that New Year's Eve scale has been an industry standard for thirty years and that all of their contracts provide for double scale for New Year's Eve work. Villanueva responded that neither the contract nor the Respondent's Handbook provide for premium pay for New Year's Eve, which is not a recognized holiday for the Respondent's employees.

Article IX of the Master Agreement, Employer's Rights, states, *inter alia*, that the Employer retains the "sole and exclusive right...to schedule and change working hours, shifts and days off..." Further, Addendum A of the Master Agreement states:

Wage Scale for Musicians First Employed on or before the Execution of This Agreement:

Musician Lead (currently Richard Allen):

Shift I Mondays through Thursdays from 6:00 p.m. to 12:00 a.m. - \$50 per hour

Shift II, Fridays from 12:00 p.m. to 2:00 p.m. - \$50 per hour

Shift III, Saturdays and Sundays from 10:30 a.m. 3:00 p.m. - \$67 per hour

Shift IV, Fridays from 5:30 p.m. to 9:30 p.m. - \$75 per hour

Shift V, Fridays from 9:30 p.m. to 1:30 a.m. - \$75 per hour

Shift VI, Saturdays from 5:30 p.m. to 9:30 p.m. - \$75 per hour

Shift VII, Saturdays from 9:30 p.m. to 1:30 a.m. - \$75 per hour

Shift VIII, Sunday from 5:30 p.m. to 11:30 p.m. \$50 per hour

Musician:

Shift I, Mondays through Thursdays from 6:00 p.m. to 12:00 a.m. - \$42 per hour

Shift II. Fridays from 12:00 p.m. to 2:00 p.m. - \$42 per hour

Shift III, Saturdays and Sundays from 10:30 a.m. 3:00 p.m. - \$55 per hour

Shift IV, Fridays from 5:30 p.m. to 9:30 p.m. - \$63 per hour

Shift V, Fridays from 9:30 p.m. to 1:30 a.m. - \$63 per hour

5 Shift VI, Saturdays from 5:30 p.m. to 9:30 p.m. - \$63 per hour

Shift VII, Saturdays from 9:30 p.m. to 1:30 a.m. - \$63 per hour

10 Shift VIII, Sunday from 5:30 p.m. to 11:30 p.m. \$42 per hour

Wage Scale for Musicians First Employed After the Execution of This Agreement:
Musician:

Shift I, Mondays through Thursdays from 6:00 p.m. to 12:00 a.m. - \$30 per hour

15 Shift II, Fridays from 12:00 p.m. to 2:00 p.m. - \$30 per hour

Shift III, Saturdays and Sundays from 10:30 a.m. to 3:00 p.m. - \$30 per hour

20 Shift IV, Fridays from 5:30 p.m. to 9:30 p.m. - \$30 per hour

Shift V, Fridays from 9:30 p.m. to 1:30 a.m. - \$30 per hour

25 Shift VI, Saturdays from 5:30 p.m. to 9:30 p.m. - \$30 per hour

Shift VII, Saturdays from 9:30 p.m. to 1:30 a.m. - \$30 per hour

Shift VIII, Sunday from 5:30 p.m. to 11:30 p.m. \$30 per hour

30 **Analysis**

The initial issue is whether the Respondent violated Section 8(a)(1)(5) of the Act by unilaterally changing the unit employees' shift lengths. During the bargaining that resulted in the June 22, 2015 Master Agreement, the parties discussed the Respondent's desire to change the unit employees' shifts, and that these discussions resulted in Article III, Section B of the Agreement, entitled "Scheduling and Reporting," reads: "Changes to Shifts: The Employer retains the sole and exclusive right to assign shifts or work schedules for Musicians. Changes to work schedules may be made by the Employer-at any time, so long as it has notified the Musicians at least 24 hours prior to the change." Further, the Master Agreement, at Article IX, Section A, provides that the Respondent retained sole and exclusive right 'to schedule and change working hours, shifts and days off.' Paragraph (p) of the stipulation spells out the changes in Shifts I and VIII, and states that prior to making these changes, the Respondent gave the unit employees at least twenty four hours' notice of the change pursuant to Article III, Section B of the Master Agreement, although it did not notify the Union of the shift changes. As the Respondent conformed to the terms of the Master Agreement that it entered into with the Union, I see no unilateral change as regards the unit employees' shift changes, and I therefore recommend that this allegation be dismissed.

50 It has long been settled law that when employees are represented by a union their employer may not make unilateral changes in their terms and conditions of employment, such as wages. *NLRB v. Katz*, 369 U.S. 736, 747 (1962). In addition, the duty to maintain the *status quo* imposes an obligation on the employer not only to maintain what he has already given his

employees, but also to “implement benefits which have become conditions of employment by virtue of prior commitment or practice.” *Alpha Cellulose Corp.*, 265 NLRB177, 178 fn. 1 (1982). The stipulation provides that during at least the prior five years the unit employees had received premium pay for working on New Year’s Eve and that they were not paid premium pay for working on the evening of December 31, 2015, without prior notice to the Union. At the negotiations the Union discussed its desire that the employees not suffer a pay cut as a result of the Master Agreement and there was no discussion of New Year’s Eve pay during the bargaining. Unlike the change in the employee shift lengths discussed above, there is no contractual language contravening this past history, and there is no clear and unmistakable evidence that the Union waived its right to bargain about this subject, *Provena Hospitals*, 350 NLRB 808 (2007); *ABB, Inc.*, 355 NLRB No. 2 (2010); in fact, the Union made it clear that it didn’t want the employees to suffer a pay cut as a result of the Master Agreement. As they were not given Premium Pay for New Year’s Eve work on December 31, 2015, they did suffer a pay cut. This change therefore violated Section 8(a)(1)(5) of the Act.

Conclusions of Law

1. The Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All individuals who conduct musical performances through the Employer’s instrument, known as the Irma. These employees shall be referred to herein as the “Musician” or “Musicians.”

Excluded: All other employees, independent contractors, intermittent and casual employees, confidential employees, managerial employees, guards and supervisors within the meaning of the Act.

4. The Respondent violated Section 8(a)(1)(5) of the Act by unilaterally ceasing to pay its unit employees premium pay for work performed on the evening of December 31, 2015.

5. The Respondent did not violate the Act as further alleged in the Complaint.

The Remedy

Having found that the Respondent violated Section 8(a)(1)(5) of the Act by failing to pay its bargaining unit employees premium pay for working on the evening of December 31, 2015, I recommend that the Respondent be ordered to pay these employees the difference between premium pay and the amount that they were paid for that evenings work.

Upon the foregoing facts contained in the Stipulated Record, I hereby issue the following recommended¹

ORDER

The Respondent, The Academy of Magical Arts, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Unilaterally changing the terms and conditions of employment of its bargaining unit employees by failing to pay its employees premium pay for working on the evening of December 31, 2015, New Year's Eve, without prior notice to or consent of the Union.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Reimburse its unit employees who worked on New Year's Eve, December 31, 2015, for the difference between what they were paid and Premium Pay, which they were entitled to be paid.

(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its facility in Los Angeles, California, copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1, 2016.

¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

5 (e) **IT IS FURTHER ORDERED** that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., January 10, 2017.

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Joel P. Biblowitz
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT unilaterally change your terms and conditions of employment by failing to pay you premium pay for working on New Year's Eve, without prior notice to or consent of the Union.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL reimburse those of you who worked on the evening of December 31, 2015 (New Year's Eve) for the difference between what you were paid and what you should have received, Premium Pay.

The Academy of Magical Arts, Inc.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

11150 West Olympic Boulevard, Suite 700
Los Angeles, California 90064-1824
Hours: 8:30 a.m. to 5 p.m.
310-235-7352

The Administrative Law Judge's decision can be found at www.nlr.gov/case/31-CA-166705 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 310-235-7123.